

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
 WASHINGTON, D.C.

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In the Matter of)
)
 Implementation of the Cable Television)
 Consumer Protection and)
 Competition Act of 1992)
)
 Broadcast Signal Carriage Issues)

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

MM Docket No. 92-259

PETITION FOR RECONSIDERATION

The Association of Independent Television Stations, Inc. ("INTV"), pursuant to §1.429 of the Commission's Rules and Regulations, 47 CFR§1.429, and by its counsel, hereby requests reconsideration of the Commission's *Report and Order*, MM Docket No. 92-259, FCC 93-144 (released March 29, 1993) [hereinafter cited as *Order*]. Therein the Commission adopted rules to implement portions of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 102 Stat. ____ (1992) [hereinafter cited as the "Act"], regarding cable carriage of broadcast television signals.¹

At the outset INTV must commend the Commission for doing an outstanding job -- with commendably sound results -- under tight Congressional deadlines in resolving a myriad of issues arising from implementation and application of the must carry, channel positioning, and retransmission consent provisions of the Act.

¹The specific provisions before the Commission in this proceeding are §§4, 5, and 6, which will be codified as §§614, 615, and 325(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151 *et seq.* INTV will refer to these sections in their codified form.

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In the brief period since the release of the *Order*, real situations have arisen where further guidance from the Commission appears necessary. Thus, a few additional questions and issues require further clarification or reconsideration. Therefore, INTV respectfully urges the Commission to reconsider and clarify its *Order* as follows:

I.

A. **The Commission should clarify that stations lose no rights because they do not provide a signal of requisite strength to cable systems as of June 2, 1993.** The Act requires cable systems to carry local broadcast signals which are available at a specified signal strength at a cable system's head end. Cable systems have been required to notify all local stations by May 3, 1993, if the cable system believes the station fails to supply a signal of the requisite strength. Affected stations and systems are expected to cooperate in resolving questions of signal strength. The statute is completely clear, however, that if a broadcaster takes necessary steps to provide a strong enough signal, the cable system must carry the station's signal.

Although the Commission has required cable systems to notify stations of any signal strength problems by May 3, the Commission has specified no time period within which a station must take adequate measures to provide an adequate signal. The Commission reasoned correctly that stations would act in their best interest to insure cable carriage as quickly as possible.² However, even if a broadcaster acts promptly, the station might not be able to provide an adequate signal for some period of time after the June 2 effective date of the must carry requirement. For example, stations which elect to modify their transmission facilities, construct translators, or employ microwave facilities must seek appropriate authorization from the

²*Order* at ¶ 32.

Commission and after the authorization is secured obtain necessary equipment and complete construction or installation of the new or modified facility. Often, these delays in providing an adequate signal will be completely beyond the control of the station. The Commission should clarify that such stations should lose none of their rights as must carry stations under the Act. They should be treated no worse than new stations which commence operation after June 2, 1993. Thus, once the station provides an adequate signal, the cable system should be required to begin carriage immediately on the channel specified by the station.

B. The Commission should further clarify that if such a station is already being carried by the system, its signal may not be dropped. In either of the above cases, the cable system would suffer no unreasonable burden. In the latter case, continued carriage will just maintain the *status quo*.³ In the former case, the cable system obviously would already be aware that the station qualified as a must carry station, but for the lack of an adequate signal. The cable system also would be aware of the station's channel position options.⁴ On the other hand, if the station had no interest in providing an adequate signal so as to insure cable carriage, and so advised the cable system, the system would be aware that carriage of the station's signal would not be required in the foreseeable future.⁵

³Indeed, any suggestion that the signal of the station was inadequate would be facially ludicrous

⁴In that respect, the Commission could require that the station designate its preferred channel position by June 17, 1993, or within a specified number of days within release of the Commission's decision on reconsideration, which ever occurred later.

⁵Even then, a station financially unable to pay for necessary equipment today should not be precluded from later asserting must carry and channel positioning rights when it is able to afford the necessary equipment, authorizations, etc., to provide the requisite signal to additional cable systems.

Again, INTV's primary concern is that stations lose no rights under the must carry or channel positioning provisions of the Act simply because they do not provide a signal of requisite strength as of June 2, 1993.

II.



















A. The Commission should require cable systems to provide must carry stations, carriage of which would incur incremental distant signal copyright royalties, with a copy of their last-filed statement of account with the Copyright Office. The Commission already has concluded that cable operators provide must provide such stations "with an estimate of the expected copyright liability based on previous payments and financial information."⁶ Providing stations with a copy of a statement of account would impose a burden no greater than making a photocopy of the document. Furthermore, no breach of confidentiality would be involved. The cable systems statement of account are available for public review at the Copyright Office.

Regrettably, some stations already have received inadequate notices from cable systems. This places the station in the position of having to agree to pay an unknown amount of fees. Putting aside whether a station's agreement to pay fees without even an estimate of the amount of those fees would be a binding agreement, notices to stations which fail to provide a fee estimate clearly contravene the Commission's directive. The requirement urged by INTV would assure that stations and cable systems can estimate potential fees from a common base of information.

Whereas one might suggest that stations could secure cable systems' statements of account directly from the Copyright Office, this wrongly shifts

⁶Order at ¶114.

the burden to the station and poses an unnecessary and unreasonable burden on the station. Stations which request copies of statement of accounts from the Copyright Office must pay search fees. Moreover, they must wait for the Copyright Office to respond to their request. Alternatively, they could employ the outside the outside document retrieval service, but at considerable greater expense. In contrast, the cable system is already in possession of the Statement of Account and need not make a statement.



As INTV originally posited, the Commission should modify the market list with respect to the designated communities in each market, but need not alter the ranking of the markets currently reflected in the rule. This would provide all of the benefits intended by Congress, but avoid the disruption which might result from revision of the marketing rankings. Moreover, it would enable more stations to secure carriage throughout their ADI's without necessity of substantial copyright reimbursements to cable systems. This is what Congress intended and provided for explicitly in the Act. Therefore, the Commission should act accordingly.

E. The Commission establish a presumption that all stations are significantly viewed throughout their ADI's. INTV understands the Commission's reticence to fully update §76.51 in light of the uncertain response of the Copyright Office. The presumption of significant viewing throughout the ADI, however, would offer no basis for a similar pronouncement of uncertain future intentions from the Copyright Office. Such a presumption would make no change in the signal carriage rules as they existed in 1976. It would simply establish an presumption that the significant viewing standard in §76.5(i) had been met -- a presumption, which, of course, would remain subject to rebuttal. Furthermore, it is justified by the considerable, and now well-established, difficulties routinely encountered by stations seeking to demonstrate significant viewing in a declining universe of non-cable households.⁸ Such a presumption, therefore, would assure that superimposing the 1976 must carry rules on the requirements in the Act did not have the effect of defeating the operation of the new rules.

⁸See INTV Comments at 12, Exhibit 2.

F. Finally, with respect to copyright related issues, the Commission might wish to further clarify how incremental copyright royalties are to be determined in cases where multiple signals are to be carried pursuant to the royalty reimbursement requirement. The Commission has stated its belief that stations should be counted in order that they satisfy all the necessary conditions for attaining must carry status. INTV assumes that if two local stations may be carried only if they reimburse the system for copyright royalties, that they will be counted in the order that they provide a written commitment that the station will assume the additional copyright liability. Furthermore, INTV queries whether this would be the case irrespective of whether either station already is carried on the cable system. To eliminate any residual uncertainty, INTV respectfully requests that the Commission clarify the meaning of its *Order* in that respect.

III.

The Commission should reconsider its *Order* with respect to the addition or subtraction of communities from ADI's so as to identify communities with markets, not individual stations. INTV submits that communities may be identified as part of a market, but that such an identification should apply to every station in a market. In other words, if a community is added to a market, every station in the market should attain must carry rights (if so elected) in that community. As the Commission properly recognized, "Congress emphasized that the must carry and channel position provisions are meant to protect our system of television allocations and promote competition in local markets."⁹ If some stations are awarded additional carriage in communities shown to be part of their markets, while others are excluded from the new community, a mockery is made not only of the system of television allocations, but also of competition in the market.

⁹*Order* at ¶91.

V.

The Commission should reconsider its position to exclude Nielsen program codes from the scope of required signal carriage. The Commission has concluded that program identification codes are not program related. This is absurd. Few things appear more program related than a code used to identify a program, whether such codes are used to start VCR's, determine viewing levels, or turn off the lights. In no way can one rationally deny their relationship to the program. Furthermore, exclusion of such codes strikes at the heart of broadcast stations' ability to compete. Permitting cable to strip those codes could thoroughly confound Congress's intention to restore broadcast television's ability to compete with cable television. If the viewing measurement of a major rating service may be "neutralized" by broadcasting's most direct competitor, then the efficacy of the new must carry and channel positioning requirements could be undermined severely.

VI.

The Commission should clarify that no station electing retransmission consent may be dropped by a cable system until October 6, 1993, in the event the station and cable system fail to enter into a retransmission consent agreement. Until October 6, local station carriage is governed exclusively by the must carry rules. The prohibition on carriage without consent takes effect on October 6, 1993. Thus, continued carriage until October 6, 1993, is the only sound application of the Act. Nonetheless, the Commission ought confirm that interpretation to eliminate the possibility of signal deletion under the guise of uncertainty.

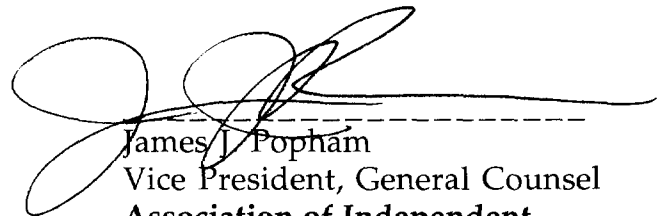
VII.

The Commission should confirm that "superstations" have retransmission consent rights within their local markets. The "superstation" exception to the retransmission consent provision should be so interpreted.¹⁰

VIII.

Inevitably, refinement of the regulations implementing the must carry/channel positioning and retransmission provisions of the Act will be an ongoing process. INTV has advanced a handful of proposals herein to further rationalize and clarify those regulations *vis-a-vis* the statute and the underlying intent of Congress. The Commission has demonstrated that it can act promptly and wisely through the adoption of its *Order* in this proceeding in a veritable pressure cooker of Congressional deadlines and competing demands on its overly burdened staff. Before the applause dies away, however, the Commission needs supply only a small encore.

Respectfully submitted,



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¹⁰INTV fully supports the position stated in the Petition for Reconsideration and/or Clarification of the Tribune Broadcasting Company filed this date in this proceeding.